



# COMMONWEALTH of VIRGINIA

## DEPARTMENT OF ENVIRONMENTAL QUALITY

TIDEWATER REGIONAL OFFICE

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L. Preston Bryant, Jr.  
Secretary of Natural Resources

David K. Paylor  
Director

Francis L. Daniel  
Regional Director

### STATE WATER CONTROL BOARD ENFORCEMENT ACTION SPECIAL ORDER BY CONSENT ISSUED TO HEARNDON CONSTRUCTION CORP. VWP Permit No. 04-2273

#### SECTION A: Purpose

This is a Consent Special Order issued under the authority of Va. Code §62.1-44.15(8a) and §62.1-44.15(8d), between the State Water Control Board and Hearndon Construction Corp., for the purpose of resolving certain violations of environmental law and/or regulations.

#### SECTION B: Definitions

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Va. Code" means the Code of Virginia (1950), as amended.
2. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
3. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia as described in Va. Code § 10.1-1183.
4. "Director" means the Director of the Department of Environmental Quality.
5. "Order" means this document, also known as a Consent Special Order.
6. "Hearndon" means Hearndon Construction Corp., certified to do business in Virginia and its affiliates, partners, subsidiaries, and parents.
7. "Property" means the Ship's Landing subdivision located in Chesapeake, Virginia.

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8. "TRO" means the Tidewater Regional Office of DEQ, located in Virginia Beach, Virginia.
9. "Permit" means VWP Permit No. 04-2273, which became effective May 18, 2005 and expires on May 17, 2015.

**SECTION C: Findings of Fact and Conclusions of Law**

1. Hearndon is constructing a residential subdivision called Ship's Landing in Chesapeake, Virginia. The site contains wetlands adjacent to Deep Creek, a tributary to the Southern Branch of the Elizabeth River.
2. The Permit allows impacts to 2.628 acres of non-tidal forested wetlands, and 0.243 acres of non-tidal scrub-shrub wetlands. The Permit requires Hearndon to mitigate for these impacts by preserving in perpetuity 8.8 acres of onsite uplands and 13.7 acres of onsite forested wetlands, and by purchasing 4.606 wetland bank credits. The Permit requires recorded deed restrictions for onsite preservation areas.
3. On May 25, 2006 the US Army Corps of Engineers notified DEQ staff that there appeared to be ongoing Permit violations associated with development activities on the Property.
4. On May 31, 2006 DEQ staff conducted a site visit at the Property to assess compliance with the Permit and observed the following:
  - i) Construction activities including road building, clearing, and installation of utility infrastructure had begun, and authorized wetland impacts had been taken. DEQ had not been notified by Hearndon prior to beginning these activities.
  - ii) DEQ had not received final construction plans or construction monitoring reports.
  - iii) DEQ had not received pre-construction photographic monitoring reports.
  - iv) DEQ had not received nor had it approved the final compensation plan from Hearndon before the start of construction activity in permitted areas.
  - v) Clearing of a wetland had occurred outside of the permitted impact area.

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- vi) Clearing of forested uplands that were to be preserved by deed restriction had occurred.
  - vii) Hearndon failed to properly demarcate surface waters and upland buffers within the compensation site and failed to properly demarcate non-impact areas.
5. DEQ staff conducted a follow-up site visit to the Property on June 2, 2006. The DEQ Property site visit report and photographs dated June 2, 2006 document the clearing and grading of several areas of wetlands and uplands that was not authorized by the Permit. A small amount of sediment had also been discharged to a wetland area from a stormwater discharge structure installed in the preservation area.
  6. During the June 2, 2006 Property site visit, DEQ staff noted that culverts intended to maintain the hydrological connection of preserved wetlands on site to the larger wetland system downstream were placed in a manner that blocked surface flow. Additionally, sediment deposits constituting unauthorized fill were observed in a wetland, adjacent to the outfall of an improperly situated stormwater discharge pipe. Further, an area of wetlands adjacent to a stub road on the property had been cleared in violation of the Permit.
  7. By letter dated June 29, 2006, Hearndon notified DEQ that it had impacted 0.593 acres of forested wetlands that was not authorized by the Permit and 0.996 acres of deed restricted uplands.
  8. VA Code §62.1-44.15:5 D(ii) states "except in compliance with permit, it is unlawful to conduct the following activities in a wetland: (ii) filling or dumping." Hearndon violated §62.1-44.15:5 D(ii) by installing a stormwater structure in wetlands that were not to be impacted under the Permit.
  9. Permit Part I.A.1 states that project activities shall be performed as described in the Joint Permit Application (JPA). Hearndon violated Part I.A.1 by impacting upland and wetland areas that were not proposed to be impacted in the JPA.
  10. Permit Part I.C.2 states that no activity shall substantially affect the movement of aquatic life. Hearndon violated Part I.C.2 by restricting surface water flow with improperly installed culverts.
  11. Permit Part I.C.11 necessitates minimization of all construction materials entering surface waters. Hearndon violated Part I.C.11 by allowing a discharge of sediment from the construction site to a wetland.

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12. Permit Part I.C.13 states that best management practices (BMPs) are to be properly installed and maintained. Hearndon violated Part I.C.13 by allowing stormwater discharge to a wetland through an improperly placed pipe.
13. Permit Part I.C.25 requires demarcation of all non-impacted wetlands. Hearndon violated Part I.C.25 by failing to properly mark non-impacted wetlands.
14. Permit Part I.C.32 states that the permittee is required to notify DEQ of any additional impacts to surface waters. Hearndon violated Part I.C.32 by failing to notify DEQ that it impacted wetlands not authorized by the Permit.
15. Permit Part I.F.2 states that appropriately sized riprap is to be utilized at outfall sites. Hearndon violated Part I.F.2 by failing to place proper riprap at the stormwater outfall which had conveyed a sediment load to a wetland area.
16. Permit Part I.G.1 states that the permittee shall conduct photographic monitoring of pre-construction conditions in the permitted impact areas. Hearndon violated Part I.G.1 by failing to conduct photographic monitoring.
17. Permit Part I.G.2 states that final plans for authorized construction activities shall be submitted to DEQ 30 days prior to disturbing permitted impact areas. Hearndon violated Part I.G.2 by taking authorized wetland impacts before submitting a final construction plan.
18. Permit Part I.G.3 states that the permittee shall submit written notification to DEQ at least 10 calendar days prior to start of construction. Hearndon violated Part I.G.3 by failing to submit construction notification.
19. Permit Part I.G.10 states that Construction Monitoring Reports (CMRs) shall be submitted to DEQ each month. Hearndon violated Part I.G.10 by failing to submit CMRs to DEQ.
20. Permit Part I.J.2 requires that the final compensation plan shall be approved prior to any construction activity in the permitted impact areas. Hearndon violated Part I.J.2 by failing to submit a final compensation plan, including deed restrictions, for the project prior to commencing construction activities in the permitted impact areas.
21. Permit Part I.J.7 requires demarcation of all surface waters and upland buffers within the compensation site limits for the life of the activity. Hearndon violated Part I.J.7 by failing to mark wetlands and upland buffers that were offered as compensation.
22. On July 7, 2006 DEQ issued NOV No. W2006-06-T-0004 to Hearndon, advising of the above listed facts and applicable regulatory citations.

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#### **SECTION D: Agreement and Order**

Accordingly, the Board, by virtue of the authority granted it in Va. Code § 62.1-44.15(8a) and (8d), orders Hearndon, and Hearndon agrees, to perform the actions described in Appendix A of this Order. In addition, the Board orders Hearndon, and Hearndon voluntarily agrees, to pay a civil charge of \$11,550 within 30 days of the effective date of the Order in settlement of the violations cited in this Order. The payment shall note that it is being made pursuant to this Order and shall include Hearndon's Federal Identification Number. Payment shall be made by check payable to the "Treasurer of Virginia," delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 10150  
Richmond, Virginia 23240

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend the Order with the consent of Hearndon, for good cause shown by Hearndon, or on its own motion after notice and opportunity to be heard.
2. This Order only addresses and resolves those violations specifically identified herein, including those matters addressed in the Notice of Violation issued to Hearndon by DEQ on June 23, 2006. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility as may be authorized by law; or (3) taking subsequent action to enforce the Order. This Order shall not preclude appropriate enforcement actions by other federal, state, or local regulatory authorities for matters not addressed herein.
3. For purposes of this Order and subsequent actions with respect to this Order, Hearndon admits the jurisdictional allegations, factual findings, and conclusions of law contained herein.
4. Hearndon consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Hearndon declares it has received fair and due process under the Administrative Process Act, Va. Code §2.2-4000 *et seq.*, and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right

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to any administrative proceeding for, or to judicial review of, any action taken by the Board to enforce this Order.

6. Failure by Hearndon to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Hearndon shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other occurrence. Hearndon shall show that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Hearndon shall notify the DEQ Regional Director in writing when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director within 24 hours of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto, their successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Hearndon. Notwithstanding the foregoing, Hearndon agrees to be bound by any compliance date which precedes the effective date of this Order.

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11. This Order shall continue in effect until the Director or Board terminates the Order in his or its sole discretion upon 30 days written notice to Hearndon. Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Hearndon from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.
12. By its signature below, Hearndon voluntarily agrees to the issuance of this Order.

And it is so ORDERED this day of \_\_\_\_\_, 2006.

\_\_\_\_\_  
Francis L. Daniel

Hearndon Construction Corp. voluntarily agrees to the issuance of this Order.

By: \_\_\_\_\_

Date: \_\_\_\_\_

10. 23. 06

Commonwealth of Virginia

City/County of Chesapeake

The foregoing document was signed and acknowledged before me this 23<sup>rd</sup> day of October, 2006, by William G. Darden, who is  
(name)

Exec. Vice President of Hearndon Construction Corp., on behalf of the Corporation.  
(title)

Pamela B. Sneedecor  
Notary Public

My commission expires: March 31, 2007

## APPENDIX A

Hearndon shall:

1. Mail all submittals and reports required by this Appendix A to:  
Francis L. Daniel, Regional Director  
DEQ, Tidewater Regional Office  
5636 Southern Blvd.  
Virginia Beach, VA 23462
2. Comply with all conditions of the Permit.
3. By December 31, 2006 apply for Permit modifications for impacts associated with the stormwater outfall and stub street. Mitigation for these impacts shall be provided at a ratio of 3 to 1.
4. By December 31, 2006 clearly mark the deed restricted areas offered as compensation with permanent signage approved by DEQ. This signage shall be placed every 200 feet or on alternating lot corners.
5. By December 31, 2006 submit for approval, an implementation schedule and restoration plan for the impacted wetland buffers specified in Sections C.5 and C.6 of this Order.
6. No later than March 31, 2007, conduct a site evaluation with DEQ wetlands program staff to finalize the implementation schedule and restoration plan. Implement the restoration plan upon approval by DEQ. All required plantings shall be completed by April 30, 2007, and deed restricted areas shall be clearly marked.
7. Within 30 days of the effective date of this order, purchase 0.66 acres of mitigation bank credits pursuant to VA Code 62.1-44.15:5.E from an approved wetland mitigation bank servicing the project area and provide DEQ documentation of the purchase. Provide documentation of this purchase to DEQ.